

STEPHEN P. ORMOND  
PETER B. KUPELIAN  
PAUL S. MAGY  
JAMES G. DERIAN  
MATTHEW W. SCHLEGEL  
GLENN A. DIEGEL  
MARK G. KAYLIAN  
TIMOTHY L. ANDERSSON  
ETHAN A. GILAN  
CAROL M. GARRETT  
DAVID B. LIPSKI  
NICOLE M. CAPOZELLO  
KEVIN A. RANG  
JOSEPH D. GUSTAVUS

KUPELIAN ORMOND & MAGY

A PROFESSIONAL CORPORATION  
MACCABEES CENTER - SUITE 950  
25800 NORTHWESTERN HIGHWAY  
SOUTHFIELD, MICHIGAN 48075

DOCKET FILE COPY ORIGINAL  
OF COUNSEL  
HOWARD L. ZOLLER

TELEPHONE  
(810) 357-0000

FACSIMILE  
(810) 357-7488

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April 17, 1997

**VIA FEDERAL EXPRESS**

Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: In the Matter of amendment of the Commission's Rules Regarding  
Multiple Address Systems ("MAS") - WT Docket No. 97-81

Dear Sir/Madam:

This letter responds to the Notice of Proposed Rulemaking released February 27, 1997 (the "Notice") calling for the submission of comments by April 21, 1997. I request that these comments be made a part of the rulemaking record and that the Federal Communications Commission ("Commission") respond to these comments as required by law.

In late 1991, the Commission announced an opportunity to apply for new frequencies in the 932/941 MHz band for multiple address systems in the private operational fixed microwave service. The Commission's invitation was intended to solicit a pool of applicants in order to conduct a lottery to assign the ultimate licenses. Over 50,000 applications were filed during January and February, 1992.

Each of the applications was required to be submitted with a fee and each of the applicants was required to conduct engineering work in order to submit a completed application. The 50,000 applicants submitted fees totalling over \$7,000,000 and incurred engineering costs estimated to be at least double this amount. The applicants incurred the fees and costs in reliance upon the Commission's promise that the applications would be granted on the basis of a random lottery:

"Applications that are found acceptable for filing will be assigned a number. *A random drawing of the assigned numbers will be*

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KUPELIAN ORMOND & MAGY

April 17, 1997

Page 2

*conducted in order to rank these applications.* To the extent that there are channels available, each applicant will be assigned its channel preference. When this is not possible, or if no channel preference is listed, then the lowest available channel will be assigned. If it is not possible to assign a channel because of prior assignments to higher ranked applicants, then the application will be set aside to be dismissed. This procedure will continue until all applications have either been assigned a channel or set aside to be dismissed.

. . .

The Commission will issues lists of applications that have been granted as quickly as administratively possible. After all applications have been processed, a further public notice will be issued opening a new filing window for any remaining channels.”

Commission Public Notice No. DA91-1422 (emphasis added). All of the applicants submitted the fees and incurred the expenses in reliance upon an express promise of the Commission to conduct a lottery.

Now, five years later, the Commission announces that it no longer intends to conduct a lottery, complaining, among other things, about the time that would be required to conduct a lottery. This is an unconscionable use of the Commission’s claimed discretion and the Commission’s change in its position is neither necessary nor lawful.

I request that the Commission specifically address the following:

1. Will the Commission return the filing fees, plus interest and reimburse the engineering costs? Nothing in the Notice addresses this question. The Commission is not authorized to retain filing fees paid by applicants on the basis of promised Commission activities that were never undertaken by the Commission. Nothing in the laws governing the Commission’s activities authorizes it to retain the fees and the benefit derived from

April 17, 1997

Page 3

them (such as interest) for 5 years without recompense. This would be an unlawful taking under the United States Constitution, besides being wrong. As for the engineering costs incurred by the applicants, when the Commission solicited funds and costly engineering activities from a pool of applicants, knowing that those applicants would be required to incur costs in order to realize the benefits, the failure of the Commission to perform as promised created an obligation by the Commission to compensate the pool of applicants for the costs they have incurred. The Commission's rulemaking should provide for the prompt repayment of applicants' fees, plus interest, together with their engineering costs incurred in reliance upon the Commission's promise to conduct a lottery.

2. Is it the Commission's position that it is *required* by the Omnibus Budget Reconciliation Act of 1993 to discontinue its announced lottery procedure for the MAS applications? Or, alternatively, is it the Commission's position that it has the *discretion* to discontinue the lottery procedure under the Omnibus Budget Reconciliation Act of 1993? An answer to these questions may help clarify whether the Commission's position is that it has been forced to breach its contractual and regulatory obligations to the MAS applicants or whether it is simply exercising claimed discretion to do so. I believe that the Commission has no discretion to discontinue the lottery under the circumstances of this case and that the Omnibus Budget Reconciliation Act of 1993 does not impose a requirement that the Commission discontinue the lottery procedure.

3. The Commission's description of potential impact on small business is gobbledygook. After having acknowledged receiving 50,000 applications for potentially valuable MAS frequencies, many of which probably represent the efforts of small businesses, the Commission has failed to describe what the impact on those small businesses will likely be if it proceeds by auction. It has failed to acknowledge frankly that an auction procedure will inherently disfavor many of those applicants.

4. How can the Commission claim that conducting a lottery would be burdensome in light of its 5-year delay? The Commission seems to think that a significant reason for the implementation of an auction procedure is that it would relieve administrative burden and time delays. The Commission has failed to demonstrate, however, that it could not have completed the requisite lottery procedures within the 5-year term it arrogated to

KUPELIAN ORMOND & MAGY

April 17, 1997

Page 4

itself. The Commission's protestations of time delays and burden ring hollow when taking into account that the applicants, many of whom are small businesses, have had over \$15,000,000 tied up in this project for 5 years.

5. Fundamentally, how does the Commission justify treating MAS applicants and their funds in a way which, if undertaken by a private business, would subject it to civil and criminal sanction?

6. The Commission should identify the physical location of the pending applications and the accounts in which the fees paid by the applicants have been maintained.

7. Will the Commission explain its unconscionable delays in responding to the undersigned's FOIA request? On August 9, 1996, the undersigned submitted an FOIA request which, despite repeated written and telephone follow-up, it has yet to honor.

Thank you for an opportunity to comment and I look forward to the Commission's response the issues contained in this letter.

Very truly yours,

KUPELIAN ORMOND & MAGY  
A Professional Corporation



Stephen P. Ormond

SPO:db

cc: Sen. Spencer Abraham  
Sen. Carl Levin  
Rep. Joe Knollenberg